Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ESTATE OF FERDINAND E. MARCOS,
Petitioner,
v.
MAXIMO HILAO, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1391(f), 1602-1611, is the exclusive jurisdictional basis for suits against officials of foreign governments brought in the courts of the United States?

2. Whether the Alien Tort Statute, 28 U.S.C. § 1350, which empowers district courts to hear "civil actions by an alien for a tort only, committed in violation of the law of nations. . ." applies extraterritorially and encompasses damage actions against foreign governmental officials based upon conduct occurring within the territory of a foreign sovereign?

3. (a) Whether a district court may issue a preliminary injunction freezing the assets of a defendant in a case in which no equitable claim is asserted and no final equitable relief is sought?

(b) Whether the Court should resolve the existing division among the courts of appeals with regard to the property of the issuance of a preliminary injunction under such circumstances?

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OPINIONS BELOW

The opinion of the court of appeals (Appendix, pp. 1a-29a) is reported at 25 F.3d 1467. The orders of the district court (Appendix, pp. 32a-39a) are unreported.

JURISDICTION AND PARTIES

The judgment of the court of appeals was entered on June 16, 1994. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on July 29, 1994 (Appendix, pp. 30a-31a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The parties in the court of appeals and in this Court are petitioner and respondents, Maximo Hilao, Vincente Clemente and Jaime Piopongo, personally and as named representatives of a class of Filipino citizens.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, sec. 2, cl. 1 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . . .

2. The Foreign Sovereign Immunities Act provides in relevant part:

> § 1330(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement.
>
> § 1603(a A 'foreign state'. . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An 'agency or instrumentality of a foreign state' means an entity—
>
> (1) which is a separate legal person, corporate or otherwise, ...
>
> § 1604 Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in § 1605-1607 of this chapter.
>
> § 1605(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

3. Section 9 of the Judiciary Act of 1789, 1 Stat. 73, 78 provided:

> *And Be It Further Enacted*, that the district court shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts as the case may be, of all cases where an alien sues for a tort only, committed in violation of the law of nations or a treaty of the United States.

4. 28 U.S.C. § 1350 provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT

The late Ferdinand E. Marcos was, from 1964 to 1986, President of the Republic of the Philippines. In 1986, following a disputed election, President Marcos came to the United States.

Shortly after the late President arrived in Hawaii numerous plaintiffs, including respondents, filed suit against him under 28 U.S.C. § 1350.

Respondents' complaint alleged that each is a Filipino and a member of a class of thousands of Filipinos who were purportedly subjected to severe mistreatment by the Philippine military during the time President Marcos held office. Respondents sought money damages on their own behalf and on behalf of the class they claimed to represent.

The district court (Fong, J.) dismissed all of the complaints, including respondent's, on the ground the defendants were immune from suit under the Act of State doctrine.

On appeal, the Ninth Circuit invited the United States to express its view on the questions of whether subject matter jurisdiction was present, whether a private federal cause of action for damages existed, and the applicability of the Act of State doctrine.[1] In response to the court's request, the United States submitted an *amicus curiae* brief contending that the district court correctly dismissed respondent's complaint for two independent reasons: the Alien Tort Statute did not give American federal courts subject matter jurisdiction over a suit by an alien against a foreign government official because of acts occurring in a foreign country and, in any event, no federal statute created a private cause of action for money damages in such circumstances. In light of these conclusions, the United States suggested, it was unnecessary for the court to reach the question whether the immunity conferred by the Act of State doctrine barred respondents' action. (*Trajano v. Marcos*, No. 86-2448, et al., Brief for the United States as *Amicus Curiae*, filed October 29, 1987.)

Having requested the advice of the Executive Branch, the court ignored it. Instead, the court entered a terse memorandum reversing the district court's holding that Act of State immunity was applicable and declining to de-

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[1] The court's order requested the United States to address the following issues: "(1) Do allegations of wrongful death, wrongful arrest, or torture committed by a foreign governmental official against a foreign national in a foreign nation plead a cause of action cognizable in a United States district court under 28 U.S.C. § 1350? (2) May federal courts hear these consolidated cases, despite the 'Act of State' doctrine, either because wrongful death, wrongful arrest, or torture cannot be 'acts of state' as a matter of law, or because the 'balance of relevant considerations' favors a hearing? (3) Should the federal courts abstain from hearing these cases because of potential embarrassment to the United States?" *Trajano v. Marcos*, No. 86-2488, *et al.*, Order filed July 16, 1987.

cide any other issue. *Trajano v. Marcos,* 878 F.2d 1439 (9th Cir. 1989) (table case).

Following remand, the Judicial Panel on Multidistrict Litigation ordered the complaints against President Marcos and petitioner then pending consolidated in the District of Hawaii. Judge Manuel E. Real of the Central District of California was designated to preside over the consolidated cases.

On November 16, 1992 the distrist court, following a short telephone hearing, entered a preliminary injunction freezing all assets of the estate, or any representative of the estate pending final judgment, notwithstanding the fact that respondent had asserted no equitable claim against the estate and sought no final equitable relief.

Petitioner immediately appealed the entry of the preliminary injunction pursuant to 28 U.S.C. § 1292(a).

On appeal, petitioner contended that respondents' suit for money damages was precluded by the Foreign Sovereign Immunities Act ("FSIA"); that 28 U.S.C. § 1350 did not apply extraterritorially and did not encompass a claim by an alien plaintiff against officials of his own government because of actions purportedly occurring in the jurisdiction of a foreign sovereign; that respondents had no private cause of action arising under federal law; that the construction of § 1350 proposed by the district court would render the statute unconstitutional; and that the district court had no authority to issue a preliminary injunction freezing petitioner's assets worldwide in the absence of any assertion by respondents of an equitable claim against petitioner and in the absence of any request by respondents for final equitable relief.

The court of appeals rejected petitioner's submission that FSIA, as construed by this court in *Argentine Republic v. Amerada-Hess Shipping Corporation,* 488 U.S. 428 (1989) constituted the sole basis for jurisdiction over

the former President of a foreign nation because of actions allegedly committed by the President while in office.

The court of appeals deemed petitioner's FSIA contention foreclosed by that court's previous decision in *Trajano v. Marcos-Manotoc*, 978 F.2d 493 (9th Cir. 1992), cert. denied —— U.S. ——, 113 S.Ct. 2960 (1993). In *Marcos-Manotoc*, the Ninth Circuit had held that acts of alleged torture authorized by members of the President Marcos' official family were not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA.

The court of appeals next rejected petitioner's contention that, under controlling decisions of this Court, jurisdiction granting statutes such as 28 U.S.C. § 1350 do not apply extraterritorially in the absence of an explicit declaration by Congress that extraterritorial application is intended.

The court of appeals also held that respondent possessed a cause of action enforceable in an American court derived exclusively from principles from "customary international law," notwithstanding the fact that, at the time respondent's complaint was filed, Congress had not enacted a statute creating such a federal cause of action cognizable in federal court.

After announcing the existence of worldwide jurisdiction under the Alien Tort Statute, including jurisdiction over a tort allegedly committed by one alien against another arising out of acts occurring outside the United States, the court next affirmed the decision of the district court which subjected petitioner to a preliminary injunction imposing a worldwide freeze on all assets of petitioner, notwithstanding the fact that respondents asserted no equitable claim against petitioner and sought no final equitable relief against petitioner. The court dismissed prior decisions stating that such preliminary injunctive relief could be entered only ancillary to a federal dis-

trict court's power to grant final equitable relief as mere "dicta".

SUMMARY OF ARGUMENT

This case presents important and far-reaching questions regarding the worldwide jurisdiction of the federal courts. The court of appeals has now held that the courts of the United States are open to tort actions by aliens who seek damages for acts allegedly committed by officials of foreign governments even though the alleged injury occurred exclusively within the territory of a foreign sovereign and without regard to whether the putative plaintiff has judicial redress in the country where the tort occurred.

The court below has also held that a tort action against an official of a foreign government may be maintained under the Alien Tort Statute notwithstanding FSIA.

Finally, the court below has upheld issuance of a worldwide preliminary injunction freezing petitioner's assets notwithstanding the fact that respondent's complaint contained no equitable claim and sought no permanent equitable relief.

Each of these holdings is inconsistent with holdings of other courts of appeals or with controlling decisions of this Court.

REASONS FOR GRANTING THE WRIT

I. THE HOLDING BELOW REGARDING JURISDICTION UNDER FSIA CONFLICTS WITH A CONTROLLING DECISION OF THIS COURT.

This case presents essentially the same question the Court decided in *Argentine Republic v. Amerada-Hess Shipping Corporation*, 488 U.S. 428 (1989): Whether a suit against an official of a foreign government may be maintained under the Alien Tort Statute notwithstanding FSIA? The *Amerada-Hess* Court answered that question in the negative. The court below, however, held that "an official acting under color of authority, but not within an

official mandate, can violate international law [and thus be subject to suit under the Alien Tort Statute] and not be entitled to immunity under FSIA." 25 F.3d at 1472 and n.8. This holding cannot be reconciled with *Amerada-Hess.*

The decision of a Head of State as to what orders should be given to the military forces of the nation he governs, and how those orders should be implemented, is the paradigm of official governmental conduct. Indeed, respondents sued President Marcos *because* he was Commander-in-Chief of the Philippine military and, respondents claimed, was, therefore, responsible for the actions of its members. On this theory, President Marcos was, obviously exercising control over an "agency or instrumentality" of a foreign sovereign—the Army of the Republic of the Philippines. In such circumstances, the holding of *Amerada-Hess* that "the FSIA provides the sole basis for obtaining jurisdiction over a [defendant covered by the Act] in the courts of this country" (488 U.S. at 443), the Alien Tort Statute Act notwithstanding, is controlling. It is important to remember in this connection that the conduct at issue in *Amerada-Hess*—the use of air power to destroy an unarmed merchant vessel on the high seas—is universally denounced by civilized nations. It was, in fact, the record of worldwide condemnation of such action upon which the Second Circuit relied in finding that Argentina's conduct violated the "law of nations." The core holding of *Amerada-Hess*, then, is that American courts lack jurisdiction over all "cases involving alleged violations of international law that do not come within one of FSIA's exceptions." 488 U.S. at 438. That holding demands reversal of the judgment below.

II. THE HOLDING BELOW THAT THE ALIEN TORT STATUTE APPLIES EXTRATERRITORIALLY IS IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT.

The court below, again on the authority of its decision in *Marcos-Manotoc*, that the Alien Tort Statute applies to a tort committed in violation of the "law of nations" anywhere in the world. The notion that a statute enacted in 1789 creates *worldwide* subject matter jurisdiction in the courts of the United States, and that the "law of nations" creates implied cause of action for money damages, for anyone anywhere in the world, is inconsistent with controlling decisions of this Court. Within the past year, the Court has reiterated that

> [i]t is a long-standing principle of American law "that legislation of Congress, unless a contrary intent appears," is meant to apply only within the territorial jurisdiction of the United States.

Smith v. United States, —— U.S. ——, 113 S. Ct. 1178, 1182 (1993), *quoting, Equal Employment Opportunity Commission v. Arabian-American Oil Co.*, 499 U.S. 244, 254 (1991). *Accord, Amerada-Hess, supra.*

Indeed, the factual context of *Amerada-Hess* and of the present case is identical: each involved an assertion of jurisdiction under the Alien Tort Statute and a claim of immunity under FSIA. The holding of the *Amerada-Hess* Court that the presumption is always *against* extraterritorial application of federal legislation was simply ignored by the court below.

The conflict between the holding below and the controlling decisions of this Court is complete. While this Court has repeatedly held that there is a "presumption against extraterritorial application of United States statutes" (*Smith, supra,* —— U.S. ——, ——, *quoting, Amerada-Hess, supra,* 488 U.S. at 436) which can be overcome only by an "affirmative showing" of a "clear

statement" from Congress (*Arabian-American Oil, supra*) the holding announced below is the exact reverse: federal legislation applies extraterritorially unless Congress expressly forbids such an interpretation. Such a holding manifestly warrants this Court's review.

III. THE COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS WITH REGARD TO ISSUANCE OF A PRELIMINARY INJUNCTION FREEZING ASSETS IN CASES WHICH ONLY A GENERAL AWARD OF MONEY DAMAGES IS SOUGHT.

Respondents seek only a general award of money damages against petitioner. Respondents do not claim to possess any equitable action against petitioner, nor do respondents seek any final equitable relief against petitioner. In these circumstances, it has been the longstanding rule of federal practice that a preliminary injunction freezing a defendant's assets in order to establish a fund from which to satisfy a potential money damage judgment is beyond the proper authority of a district court. This was the apparently unequivocal holding of the Court in *De Beers Consolidated Mines, Ltd. v. United States,* 325 U.S. 212, 220-21 (1945) ("No relief of this character has been thought justified in the long history of equity jurisprudence").[2]

In recent years, however, there has been an increasingly deep and sharp division among the courts of appeals as to the proper interpretation of *De Beers* and the appropriate occasions for issuance of a preliminary injunction freezing assets in a case in which only a general award of

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[2] Congress may, of course, enact a statutory scheme specifically authorizing such a provisional remedy and, on occasion, it has. *E.g.*, 15 U.S.C. § 21 (authorizing preliminary or permanent injunctive relief in a case of "threatened loss or damage by violation of" specified sections of the Sherman and Clayton Acts. It is not suggested that any such grant of statutory authority applies in this case.

money damages is sought. The First, Third, Fourth and Ninth Circuits have now held that *De Beers* explicitly *authorizes* issuance of such a preliminary injunction. *Teradyne, Inc. v. Mostek Corporation,* 797 F.2d 43, 52-53 (1st Cir. 1986); *Hoxworth v. Blinder, Robinson & Co.,* 903 F.2d 186, 195 (3rd Cir. 1990); *United States ex rel. Taxpayers Against Fraud v. Singer Co.,* 889 F.2d 1326, 1330 (4th Cir. 1989); and *In Re Estate of Ferdinand Marcos Human Rights Litigation,* 25 F.3d 1467, 1479-80 (9th Cir. 1994) (decision below).

On the other hand, the Fifth, Sixth, Tenth and Eleventh Circuits have held that *De Beers* explicitly *forbids* entry of such a preliminary injunction. *Dixie Carriers, Inc. v. Channelling Fueling Service, Inc. (In re Fredeman Litigation),* 843 F.2d 821, 824-25 (5th Cir. 1988); *USACO Coal Co. v. Carbonin Energy Co., Inc.,* 689 F.2d 94, 97-98 (6th Cir. 1982); *Home-Stake Production Co. v. Talon Petroleum, C.A.,* 907 F.2d 1012, 1016 (10th Cir. 1990); *Mitsubishi International v. Cardinal Textile Sales Co.,* 14 F.3d 1507, 1521 (11th Cir. 1994) *petition for certiorari pending,* No. 94-2 (6/30/94); *Rosen v. Cascade International Inc.,* 21 F.3d 1520, 1526-30 (11th Cir. 1994).[3]

The division of opinion among the circuits is wide and, increasingly, acrimonious. For example, the leading decision authorizing a preliminary injunction freezing assets

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[3] The position of the four remaining circuits is uncertain. In *Green v. Drexler (In re Feit & Drexler, Inc.),* 760 F.2d 406, 416 (2d Cir. 1985), the Second Circuit appeared to approve issuance of a preliminary injunction freezing assets. However, *Green* involved an application by a bankruptcy trustee for an order that the debtor transfer property into the jurisdiction of the bankruptcy court. The actual holding was that such an order was authorized by 11 U.S.C. § 105(a). In *Foltz v. U.S. News & World Report,* 760 F.2d 1300, 1309 (D.C. Cir. 1985), the District of Columbia Circuit appeared to endorse an asset freeze under ERISA, ERISA, however, incorporates traditional equitable remedies which a beneficiary has against his trustee. The Eighth and Federal Circuits do not appear to have discussed the issue.

when only money damages are sought is the opinion of the Third Circuit in *Hoxworth, supra. In Rosen, supra* at 1529, however, the Eleventh Circuit denounced *Hoxworth* as an opinion that "tortures the express language of *De Beers* and runs counter to established equitable principles." Such language is rarely used by one court of appeals to describe the holding of a sister circuit.

A division of opinion among the circuits upon a major principle of federal practice, evoking strong expressions of fundamental disagreement and leading to irreconcilably inconsistent results in cases presenting indistinguishable facts, should not be permitted to continue. The pending petition for certiorari in *Mitsubishi* and the instant case present appropriate vehicles for resolving the conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-15526

IN RE ESTATE OF FERDINAND MARCOS,
HUMAN RIGHTS LITIGATION.

MAXIMO HILAO, *et al., Class Plaintiffs*; VICENTE CLEMENTE, *et al., Class Plaintiffs*; JAIME PIOPONGCO, *et al., Class Plaintiffs.*
Plaintiffs-Appellees,
v.

ESTATE OF FERDINAND MARCOS,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Hawaii

Argued and Submitted May 4, 1993
Decided June 16, 1994

Before: GOODWIN, TANG, and NOONAN, Circuit Judges.

Opinion by Judge TANG.

TANG, Senior Circuit Judge:

OVERVIEW

Defendant Estate of Ferdinand Marcos ("the Estate") appeals from the district court's order preliminarily enjoining the Estate from transferring, secreting or dissipating the Estate's assets *pendente lite*. On this interlocutory appeal, the Estate also challenges the district court's subject matter jurisdiction under the Foreign Sovereign Immunities Act and Alien Tort Act, claims that the plaintiffs do not state a cause of action, and contends that any cause of action abated upon Marcos' death. We have jurisdiction and affirm.

BACKGROUND

During Ferdinand Marcos' tenure as President of the Philippines, up to 10,000 people in the Philippines were allegedly tortured, summarily executed or disappeared at the hands of military intelligence personnel acting pursuant to martial law declared by Marcos in 1971. Military intelligence allegedly operated under the authority of Marcos, General Fabian Ver, and Imee Marcos-Manotoc (Ferdinand Marcos' daughter).

Marcos, his family, Ver and others loyal to Marcos fled to Hawaii in February, 1986. One month later, a number of lawsuits were filed against Marcos, Ver, and/or Imee Marcos-Manotoc, claiming that the plaintiffs had been arrested and tortured, or were the families of people arrested, tortured, and executed between 1971 and 1986.

All actions were dismissed by district courts on the "act of state" defense; we reversed and remanded in an unpublished decision. *Hilao v. Marcos*, 878 F.2d 1438 (9th Cir.1989); *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir.1989) (table decisions). The Judicial Panel on Multi-District Litigation then consolidated all cases in the District of Hawaii on September 5, 1990. The case was certified as a class action on April 8, 1991, and a consolidated amended complaint naming the Estate as a defendant was filed on behalf of the class.

Default was entered against Imee Marcos-Manotoc in 1986 in *Trajano v. Marcos*, one of the individual cases consolidated in this action. In 1991, Marcos-Manotoc moved to set aside the default and moved to dismiss for lack of subject matter jurisdiction under the Alien Tort Act and immunity under the Foreign Sovereign Immunities Act. The motions were denied, and judgment was entered against Marcos-Manotoc. We affirmed on appeal. *See Trajano v. Marcos (In re: Estate of Ferdinand E. Marcos Litigation)*, 978 F.2d 493 (9th Cir.1992) ("Estate I"), *cert. denied*, —— U.S. ——, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993).

On November 1, 1991, the plaintiffs moved for a preliminary injunction to prevent the Estate from transferring or secreting any assets in order to preserve the possibility of collecting a judgment. The Estate had earlier been enjoined from transferring or secreting assets in an action brought by the Republic of the Philippines against Ferdinand Marcos. That preliminary injunction had been appealed, and was affirmed. *See Republic of Philippines v. Marcos*, 862 F.2d 1355 (9th Cir.1988) (en banc), *cert. denied*, 490 U.S. 1035, 109 S.Ct. 1933, 104 L.Ed.2d 404 (1989). When the preliminary injunction in that case was dissolved due to a settlement, the plaintiffs in this action immediately sought the continuation of that injunction. The district court granted the motion.

Pending this interlocutory appeal of the preliminary injunction, trial on liability proceeded. On September 24, 1992, the jury rendered a verdict in favor of the class and the individually-named plaintiffs (except for plaintiff Wilson Madayag). The Estate's motion for JNOV was denied, and judgment was entered in favor of the prevailing plaintiffs. The preliminary injunction was modified on November 16, 1993, to set forth the jury verdict on liability, to compel the legal representatives of the Estate to fully and completely answer plaintiffs' interrogatories regarding the assets of the estate, to name the Swiss banks at which the Marcoses had deposited monies as represen-

tatives of the Estate, and to permit the plaintiffs to take discovery regarding these assets.

On February 23, 1994, the jury awarded the plaintiffs $1.2 billion in exemplary damages. The jury will reconvene to determine compensatory damages.

DISCUSSION

I. *The Foreign Sovereign Immunities Act*

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11,[1] is the sole basis for obtaining jurisdiction over a foreign state and its agencies or instrumentalities.[2] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989) ("*Amerada Hess*"). Subject

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[1] Section 1330 states in relevant part:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Section 1604 provides that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

"Sections 1604 and 1330(a) work in tandem: 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989).

[2] Section 1603(b) defines "agency or instrumentality" as a separate legal person which is an organ or political subdivision of a foreign state. This may include individuals acting in their official capacity. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1099-1103 (9th Cir.1990).

matter jurisdiction against a foreign state depends on the existence of one of the exceptions to immunity set forth in FSIA. *Estate I*, 978 F.2d at 496, *citing, Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) *See also Liu v Republic of China*, 892 F.2d 1419, 1424 (9th Cir.1989), *cert. dismissed*, 497 U.S. 1058, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990). The existence of subject matter jurisdiction under FSIA is a question of law reviewed *de novo. Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir.1992) ("*Siderman*"), *cert. denied*, —— U.S. ——, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

The Estate argues that this action does not fall within any of the articulated exceptions to immunity and should therefore be dismissed. In particular, the Estate argues that under 28 U.S.C. § 1605(a)(5)[3], a foreign state is immune to damages for personal injury or death unless it occurs in the United States. *See Amerada Hess*, 488 U.S. at 439, 109 S.Ct. at 690-91; *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir.1983), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 83 L.Ed.2d 182 (1984).

However, we have previously rejected the Estate's argument that FSIA immunizes alleged acts of torture and execution by a foreign official. On appeal from entry of default judgment against Imee Marcos-Manotoc, we rejected Marcos-Manotoc's assertion that she was entitled to sovereign immunity because her challenged actions were premised on her authority as a government agent. *Estate I*, 978 F.2d at 497. In *Chuidian v. Philippine*

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[3] Section 1605 sets out "general exceptions to the jurisdictional immunity of a foreign state." Section 1605(a)(5) provides that a foreign state is not immune where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."

Nat'l Bank, 912 F.2d 1095 (9th Cir.1990), we had held that FSIA does not immunize a foreign official engaged in acts beyond the scope of his authority:

> Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do.

Id. at 1106 (quotation omitted). We held that upon default, Marcos-Manotoc admitted that she acted on her own authority, not that of the Republic of the Philippines. Her acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA. *Estate I*, 978 F.2d at 498.

Like Marcos-Manotoc, the Estate argues that Marcos' acts were premised on his official authority, and thus fall within FSIA. However, because the allegations of the complaint are taken as true for purposes of determining whether an action should be dismissed,[4] *Siderman*, 965 F.2d at 706, Marcos' actions should be treated as taken without official mandate pursuant to his own authority.

Further, we rejected the argument that Marcos' actions were "official" or "public" acts when we reversed the dis-

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[4] The complaint alleges, *inter alia*, that "Marcos under color of law, ordered, orchestrated, directed, sanctioned and tolerated the continuous and systematic violation of human rights of plaintiffs and the class through the military, para-military and intelligence forces he controlled"; that at "the direction or with the approval of Marcos, plaintiffs and about 10,000 class members were arrested without cause, held incommunicado and routinely subjected to 'tactical interrogation,' a euphemism for torture during interrogation"; that following tactical interrogation "many class members were arbitrarily detained for a year or more with Marcos' authorization and approval"; and that over 2,000 class members were summarily executed. [CR 3 at 13-14]. Further, the complaint alleges that these actions were violations of international law and the constitution and law of the Phillipines.

missal of the actions against Ferdinand Marcos on the "act of state doctrine." In *Estate I*, we explained:

> This [conclusion that Marcos-Manotoc's acts were not taken pursuant to an official mandate] is consistent with our earlier decision that the same allegations against former President Marcos are not nonjusticiable "acts of state." *See Trajano v. Marcos*, 878 F.2d 1439 (9th Cir.1989) [table decision]. In so holding, we implicitly rejected the possibility that the acts set out in Trajano's complaint were public acts of the sovereign.

Id. at 498 n.10.

Moreover, in *Republic of the Philippines*, we held that Marcos' alleged illegal acts were not official acts pursuant to his authority as President of the Philippines. We rejected the contention that the Republic's RICO suit against Marcos involved a nonjusticiable political question:

> Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law. As in the case of the deposed Venezuelan ruler, Marcos Perez Jimenez, the latter acts are as adjudicable and redressable as would be a dictator's act of rape.

Republic of the Philippines, 862 F.2d at 1361, *citing Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir.1962), *cert. denied*, 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963).

In *Jimenez*, the former dictator of Venezuela was charged in the United States with murder [5] and various

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[5] The court found no probable cause to support the murder charges. *Id.* at 552.

financial crimes committed for personal gain in Venezuela. *Jimenez,* 311 F.2d at 552. The Fifth Circuit rejected Jimenez' argument that his acts were those of the sovereign because he was dictator, and therefore immunized under the "act of state" doctrine. The court stated:

> Even though characterized as a dictator appellant was not himself the sovereign—government of—Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela. It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies.
>
> Appellant's acts . . . were not acts of Venezuelan sovereignty. . . . They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an "Act of State."

Id. at 557-58 (citations omitted). In citing *Jimenez* with approval, we adopted its conclusion that the illegal acts of a dictator are not "official acts" unreviewable by federal courts.

Siderman does not dictate a contrary result. In that case, we held that Argentina's official acts of torture, though clearly constituting *jus cogens*[6] *violations of international law, were immunized under FSIA. Siderman,* 965 F.2d at 718. We noted that the Supreme Court in *Amerada Hess* had been "emphatic in its pronouncement 'that immunity is granted in those cases involving alleged

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[6] "[A] *jus cogens* norm, also known as a 'peremptory norm' of international law, is a norm accented and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Siderman,* 965 F.2d at 714, *quoting* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

violations of international law that do not come within one of the FSIA's exceptions,' " and concluded that "if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so." *Id.* at 719. However, *Siderman* was an action *against the Republic of Argentina,* which clearly fell within the "foreign state" scope of FSIA. In this case, the action is against the estate of *an individual official* who is accused of engaging in activities outside the scope of his authority. FSIA thus does not apply to this case.

This interpretation is consistent with FSIA's codification of the "restrictive" principle of sovereign immunity in international law, which limits the immunity of a foreign state to its "inherently governmental or 'public' acts, but does not extend to suits based on its commercial or private acts. *Chuidian,* 912 F.2d at 1099-1100. *See also Siderman,* 965 F.2d at 705-06 (reviewing history of foreign state immunity and the enactment of FSIA); *McKeel,* 722 F.2d at 587 n. 6. Immunity is extended to an individual only when acting *on behalf of* the state because actions against those individuals are "the practical equivalent of a suit against the sovereign directly." *Chuidian,* 912 F.2d at 1101. A lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts.

This is evidenced by the Philippine government's agreement that the suit against Marcos proceed. The Minister of Justice of the Republic of the Philippines, Neptali A. Gonzales, prepared a letter to the Deputy Minister of Foreign Affairs, Leticia R. Shahani, concluding that "Marcos may be held liable for acts done as President during his incumbency, when such acts, like torture, inhuman treatment of detainees, etc. are clearly in violation of existing law . . . the government or its officials may not validly claim state immunity for acts committed against a private party in violation of existing law." [Attachment 19a to

Response Brief.] The Republic also filed an *amicus curiae* brief in the appeal from the dismissals on "act of state" grounds which urged the Ninth Circuit to reverse the district courts. The Republic stated that "foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." [Attachment 22a, 35a to Response Brief.] [7]

In conclusion, Marcos' acts of torture, execution, and disappearance were clearly acts outside of his authority as President. Like those of Marcos-Manotoc, Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA.[8] *Estate I*, 978

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[7] The plaintiffs argue that these submissions constitute a waiver of sovereign immunity under FSIA by the Republic of the Philippines, and that Marcos' derivative immunity is thus also waived. The Estate objects that neither of these documents contain an explicit "waiver" of immunity, and that there is no authority allowing one government official to waive the immunity of another official. *See Chuidian*, 912 F.2d at 1103-05 (waiver by one Philippine governmental entity does not extend to a different entity). It is unnecessary to reach this issue, in view of the conclusion that FSIA does not immunize the illegal conduct of government officials. *See Estate I*, 978 F.2d at 498 n. 11 (finding it unnecessary to reach the waiver of immunity issue).

[8] We also reject the Estate's argument that because "only individuals who have acted under official authority or under color of such authority may violate international law," *Estate I*, 978 F.2d at 501-02, a finding that Marcos' alleged actions were outside the scope of his official authority necessarily leads to the conclusion that there was no violation of international law. An official acting under color of authority, but not within an official candidate, can violate international law and not be entitled to immunity under FSIA." *See Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("Paraguay's renunciation or torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.").

F.2d at 498; *Chuidian,* 912 F.2d at 1106. No exception to FSIA thus need be demonstrated.

II. *Subject matter jurisdiction under the Alien Tort Act*

The Alien Tort Act, 28 U.S.C. § 1350, enacted as part of the First Judiciary Act of 1789, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

In upholding the default judgment against Marcos-Manotoc, we held that a "suit as an alien for the tort of wrongful death, committed by military intelligence officials through torture prohibited by the law of nations, is within the jurisdictional grant of § 1350." *Estate I* 978 F.2d at 499. In so holding, we rejected all of the Estate's arguments now asserted on appeal.

The Estate contends that there is no jurisdiction pursuant to the "Arising Under" Clause of Art. III because 28 U.S.C. § 1350 is purely a jurisdictional statute. In *Estate I,* we agreed that a jurisdictional statute could "not alone confer jurisdiction on the federal courts, and that the rights of the parties must stand or fall on federal substantive law to pass constitutional muster." *Estate I,* 978 F.2d at 501, *citing Mesa v. California,* 489 U.S. 121, 136-37, 109 S.Ct. 959, 968-69, 103 L.Ed.2d 99 (1989) and *Verlinden,* 461 U.S. at 495-97, 103 S.Ct. at 1972-73. However, we disagreed that there was no federal substantive law governing the dispute.

First, we concluded that even where FSIA was held inapplicable, there was federal subject matter jurisdiction by virtue of the required analysis of whether immunity would be granted under FSIA. *Estate I,* 978 F.2d at 501. This court stated:

> [W]e have concluded that [Marcos-Manotoc's] actions were not those of the Republic of the Philip-

> pines for purposes of sovereign immunity under *Chuidian*. Nevertheless, when questions of sovereign immunity under the FSIA are raised, as they have been here, . . . [u]nder *Verlinden*, subject-matter jurisdiction over this action satisfies Article III.

Id. at 502 (footnote omitted).

We also rejected the Estate's argument that international law does not provide a basis for federal court jurisdiction under § 1350:

> [T]he prohibition against official torture carries with it the force of a *jus cogens* norm, which enjoys the highest status within the international law. . . . We therefore conclude that the district court did not err in founding jurisdiction on a violation of the *jus cogens* norm prohibiting official torture.

Estate I, 978 F.2d at 500 (internal quotations omitted), citing *Siderman*, 965 F.2d at 717. "It is . . . well settled that the law of nations is part of federal common law." *Id.* at 502, *citing The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction").

The Estate argues that we have held that "[i]nternational law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts," quoting *United States v. Davis*, 905 F.2d 245, 248 n. 1 (9th Cir.1990), *cert. denied*, 498 U.S. 1047, 111 S.Ct. 753, 112 L.Ed.2d 773 (1991). In *Davis*, the defendant appealed his conviction under the Maritime Law Drug Enforcement Act, after he was seized by the Coast Guard on the high seas. We stated that

> [C]ompliance with international law does not determine whether the United States may apply the

> Act to his conduct. Only two restrictions exist on giving extraterritorial effect to Congress' directives. We require Congress [to] make clear its intent to give extraterritorial effects to its statutes. And secondly, as a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment.

Davis, 905 at 248 (citations and footnote omitted). *Davis* thus dealt with the extraterritorial application of federal statutes that come into conflict with international law.

The *Davis* court cited *United States v. Thomas,* 893 F.2d 1066, 1068-69 (9th Cir.), *cert. denied,* 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990), for its conclusion that "[i]nternational law principles, standing on their own, do not create substantive rights." *Davis,* 905 F.2d at 248 n. 1. In *Thomas,* the defendant argued that 18 U.S.C. §§ 2251-52, prohibiting child pornography, did not apply extraterritorially to his conduct in Mexico. We held that a penal statute may apply to extraterritorial acts absent a violation of due process. *Id.* at 1068. Further, we concluded that extraterritorial application would not violate international law: "[a]lthough Congress is not bound by international law in enacting statutes, out of respect for other nations, courts should not unnecessarily construe a congressional statute in a way that violates international law." *Id.* at 1069 (citations omitted). Thus, neither *Davis* nor *Thomas* held that international law is not a part of federal common law if there are no contradictory federal statutes.

The Estate also argues that the assertion of federal jurisdiction over an action between aliens regarding injuries occurring in a foreign nation violates Article III of the Constitution. We held in *Estate I* that there is "ample indication" that the "Arising Under" Clause was meant to

apply to "all cases involving foreigners." *Estate I*, 978 F.2d at 502 (discussing papers of James Madison and Alexander Hamilton). The Estate nonetheless argues that early decisions regarding the interpretation of section 11 of the First Judiciary Act (the Diversity Clause), should control the interpretations of section 9 of the Act (the "Arising Under" Clause). In *Mossman v. Higginson*, 4 Dall. 12, 13, 1 L.Ed. 720 (1800), for instance, the Court stated:

> [The] 11th section of the judiciary act can and must receive a construction consistent with the constitution. It says, it is true, in general terms, that the circuit court shall have cognisance of suits "where an alien is a party;" but . . . the legislative power of conferring jurisdiction on the federal courts, is, in this respect, confined to suits between citizens and foreigners.

The Estate's argument that section 9 requires one of the parties to be a citizen was explicitly rejected by the Supreme Court in *Verlinden*. The Supreme Court held that "the 'Arising Under' Clause of Art. III provides an appropriate basis for the statutory grant of subject-matter jurisdiction to actions by foreign plaintiffs under the Act." *Verlinden*, 461 U.S. at 492, 103 S.Ct. at 1970. The Court reviewed the "controlling decision on the scope of Art. III 'arising under' jurisdiction," *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L.Ed. 204 (1824), and concluded that it reflected

> a broad conception of "arising under" jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law. . . . [A] suit against a foreign state under [FSIA] necessarily raises questions of substantive federal law at the very outset, and hence clearly "arises under" federal law, as that term is used in Art. III.

Verlinden, 461 U.S. at 492-93, 103 S.Ct. at 1971.[9] *See also Chuidian,* 912 F.2d at 1098 ("Federal courts have jurisdiction over suits against foreign sovereigns under [FSIA], even where the parties are not diverse and the underlying claims do not present a federal question") (citation to *Verlinden omitted*); *Filartiga v. Pena-Irala,* 630 F.2d 876, 878 (2d Cir.1980).

In conclusion, this action brought for torts "committed by military intelligence officials through torture prohibited by law of nations, is within the jurisdictional grant of § 1350." *Estate I,* 978 F.2d at 499. This exercise of jurisdiction does not violate Article III.

III. *Cause of action under the Alien Tort Act*

The Estate argues that the Alien Tort Act is a purely jurisdictional statute which does not provide the plaintiffs a cause of action. The Estate contends that § 1350, like the § 1331 "arising under" jurisdictional provision, does not grant a cause of action. *See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.,* 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed.2d 912 (1951) (the "Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions").

However, in contrast to section 1331, "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation

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[9] In *McKeel* we held that FSIA did not provide a basis for "arising under" jurisdiction pursuant to 28 U.S.C. § 1331. *See McKeel,* 722 F.2d at 586 ("FSIA, however, does not affect the substantive law of liability . . . and therefore does not provide a basis for statutory 'arising under' jurisdiction"). However, the "Arising Under" Clause of Art. III is construed more broadly than the same clause in 28 U.S.C. § 1331. *Estate I,* 978 F.2d at 502. *See also Verlinden,* 461 U.S. at 495, 103 S.Ct. at 1972.

of the law of nations' in order to create a cause of action." *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 779 (D.C.Cir.1984) (Edwards, J., concurring), *cert. denied,* 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). It is unnecessary that international law provide a *specific* right to sue. International law "does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions." *Id.* at 777-78 (quoting L. Henkin, *Foreign Affairs and the Constitution* 224 (1972)). "[N]othing more than a *violation* of the law of nations is required to invoke section 1350." *Id.* at 779.

Actionable violations of international law must be of a norm that is specific, universal, and obligatory. *See Filartiga,* 630 F.2d at 881; *Tel-Oren,* 726 F.2d at 781; *cf. Guinto v. Marcos,* 654 F.Supp. 276, 280 (S.D.Cal. 1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations' "); *see also Forti v. Suarez-Mason,* 672 F.Supp. 1531, 1539-40 (N.D. Cal. 1987) ("This 'international tort' must be one which is definable, obligatory (rather than horatory), and universally condemned"), *amended in part,* 694 F.Supp. 707 (N.D.Cal. 1989).

Our reading of the plain text of § 1350 is confirmed by the Torture Victim Protection Act of 1991, Pub.L. 102-256, 106 Stat. 78, codified at this section. *See* S.Rep. No. 249, 102d Cong., 1st Sess. 4-5 (1991); H.R.Rep. No. 367, 102d Cong., 1st Sess. pt. 1, *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

The allegations in this case satisfy the specific, universal and obligatory standard. "Under international law, . . . official torture violates *jus cogens.*" *Siderman,* 965 F.2d at 717.

> [T]he right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.

Id. *See also Tel-Oren,* 726 F.2d at 781 (Edwards, J., concurring) (torture is violation of customary international law); *Tel-Oren,* 726 F.2d at 819-20 (Bork, J., concurring) ("the proscription of official torture [is] a principle that is embodied in numerous international conventions and declarations, that is 'clear and unambiguous' . . . and about which there is universal agreement 'in the modern usage and practice of nations' "); *Filartiga,* 630 F.2d at 880-84 (discussing declarations of the United States General Assembly, human rights conventions prohibiting torture, modern municipal law, and the works of jurists); *Forti,* 672 F.Supp. at 1541 (prohibition against official torture is "universal, obligatory, and definable"). The United States signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. (No. 51), 23 I.L.M. 1027 (1987), to which the United States Senate gave its advice and consent. *Siderman,* 965 F.2d at 716. The prohibition against summary execution or causing "disappearance" is similarly universal, definable, and obligatory. *Forti,* 672 F.Supp. at 1542, *amended,* 694 F.Supp. at 710-11.

We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer[]

fundamental rights upon all people vis-a-vis their own governments." *Filartiga,* 630 F.2d at 885-87.[10] The plaintiffs state a cause of action.

IV. *Abatement*

The Estate argues that tort claims for personal injuries or wrongful death abate upon the death of either the plaintiff or the defendant. The Estate cites *Heikkila v. Barber,* 308 F.2d 558 (9th Cir.1962), in which this court held that the plaintiff's claim seeking to hold the defendant in contempt for wrongfully deporting the plaintiff, and seeking damages therefor, did not survive the plaintiff's death. The court held that Heikkila's claim most closely resembled the tort of unlawful imprisonment, false arrest, or trespass to his person, and at common law actions for tort did not survive the death of a party. *Id.* Refusing to apply state law for the survival of actions, the court stated, "A cause of action which is given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law."[11] *Id.* at 561 (quotation omitted).

"The choice of law inquiry is . . . primarily concerned with fairness." *Filartiga,* 630 F.2d at 889. Despite the

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[10] Though not raised by the parties, the plaintiffs may also state a cause of action for violations of municipal law. *See Estate I,* 978 F.2d at 503 (Trajano's claims against Marcos-Manotoc arose under wrongful death statutes as well as international law). *See generally Tel-Oren,* 726 F.2d at 782-88 (Edwards, J.) (substantive right could be derived from the domestic tort law of the United States if there is a nexus between the international tort providing jurisdiction and the domestic law tort providing the cause of action, and if limited to actions constituting universal crimes, domestic torts committed within the United States and injuring rights under international law, and torts committed by United States citizens abroad). We do not decide this issue.

[11] Heikkila's cause of action arose from the federal statute granting damages resulting from contempt, 18 U.S.C. §§ 401 and 402.

fact that plaintiffs' cause of action arises under the Alien *Tort* Act, plaintiffs' claims are most closely analogous to a claim that government officials violated the Eighth Amendment right of freedom from cruel and unusual punishment, *see Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976) (torture is prohibited by the Eighth Amendment), which does not abate upon the death of the defendant.[12] *See Carlson v. Green,* 446 U.S. 14, 24, 100 S.Ct. 1468, 1474-75, 64 L.Ed.2d 15 (1980) (a cause of action for an Eighth Amendment violation survives the death of a party). Alternatively, a § 1350 action is closely analogous to a violation of 42 U.S.C. § 1983. *See Forti,* 672 F.Supp. at 1546 ("Claims for tortious conduct of government officials under 28 U.S.C. § 1350 may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983, where plaintiffs must allege both deprivation of a federally protected right and action 'under color of' state law."). A § 1983 action also survives the death of a party. *See Robertson v. Wegmann,* 436 U.S. 584, 592, 98 S.Ct. 1991, 1996, 56 L.Ed.2d 554 (1978) (applying state survivorship law).

In conclusion, the plaintiffs' claims survive the death of Ferdinand Marcos.

V. *Authority to preliminarily enjoin the Estate from transferring, secreting or dissipating the Estate's assets pendente lite*

The grant of a preliminary injunction will be reversed only if the lower court abused its discretion or based its decision on an erroneous legal standard or clearly erroneous findings of fact. *Wilson v. Watt,* 703 F.2d 395, 398 (9th Cir.1983). The Estate argues that the district

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[12] While the Constitution itself does not apply to aliens whose claims arise outside the United States, *United States v. Verdugo-Urquidez,* 494 U.S. 259, 268, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), we may employ this analogy for purposes of abatement.

court exceeded its authority in granting a preliminary injunction in a case seeking only money damages.[13]

It is unquestionable that it is within the district court's authority to issue a preliminary injunction where final equitable relief is sought. *See Reebock Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 559 (9th Cir. 1992) ("the injunction is authorized by the district court's inherent equitable power to issue provisional remedies ancillary to its authority to provide final equitable relief"). In fact, this court upheld the preliminary injunction entered in *Republic of the Philippines v. Marcos,* 862 F.2d 1355, to preevnt Marcos (and subsequently, his Estate) from transferring or dissipating assets, and which these plaintiffs seek to continue. In that case, the Republic of the Philippines had brought a RICO suit against the Marcoses claiming that the Marcoses had converted public property to their own use, but also alleging a constructive trust. *Id.* at 1364. This court found that there was authority "to issue a preliminary injunction in order to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies." *Id.*

Indeed, some of our case law suggests that final equitable relief must be requested to authorize preliminary injunctive relief. *See F.T.C. v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir.1982) ("Because the authority to issue a preliminary injunction rests upon the authority to give final relief, the authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy."). However, to the extent that all of these cases involved equitable relief, any language is dicta which addressed the court's authority to

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[13] **Final equitable relief was not sought in this case. The class action complaint merely requests an injunction against the transfer of assets in count two, based on allegations that the assets of the Estate will be transferred or secreted to avoid payment of a judgment.**

issue a preliminary injunction where only money damages are sought.

In fact, there is support in our case law for the opposite conclusion. In *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389 (9th Cir.1984), a preliminary injunction had been issued where the plaintiff had alleged that the defendant was planning to dispose of its business assets which would therefore be unavailable for levy of execution. *Id.* at 1391. We reversed the preliminary injunction, but *not* because only money damages had been sought. We pointed to evidence presented to the district court that the company purchasing the assets had agreed to indemnify the defendant for plaintiff's claim, and concluded "that the proposed sale to [the company] would have provided adequate protection to Flynt for any money damages it may obtain." *Id.* at 1395-96. The preliminary injunction was reversed because the district court had *not* found that money damages would be an inadequate remedy. *Id.* at 1394, *citing Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1202 (9th Cir.1980) ("The basis of injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies."). Our decision thus implied that the traditional test for a preliminary injunction is applied in a case seeking money damages, and that if the plaintiff had demonstrated that the defendant's assets would otherwise be available, the preliminary injunction would have been appropriate.

The Supreme Court also has not directly decided this issue, although its precedent suggests that a preliminary injunction should be available where a remedy would be inadequate due to the dissipation of assets.

In *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945), on which the Estate seeks to rely, the government brought a suit to enjoin future antitrust violations, and did not seek money damages for past violations. *Id.* at 219-20,

65 S.Ct. at 1133-34. The government sought a preliminary injunction to freeze the defendant's assets so that it could later have a practical means of enforcing a *possible* contempt sanction. The Court rejected the preliminary injunction as dealing "with a matter wholly outside the issues in the suit." *Id.* at 220, 65 S.Ct. at 1134.

The *De Beers* Court stated that granting the preliminary injunction in that case

> would create a precedent of sweeping effect. . . . Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him. . . . And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestering his opponent's assets pending recovery and satisfaction of a judgment in such a law action.

De Beers, 325 U.S. at 222-23, 65 S.Ct. at 1135. However, the actual scope of the holding in *De Beers* is much narrower. *See Reebok Int'l,* 970 F.2d at 561 (labelling this passage dicta). As explained by the Third Circuit: "The preliminary injunction was inappropriate [in *De Beers*] not because the plaintiff was seeking money damages . . . the injunction was inappropriate precisely because the plaintiff could *not* recover any money damages." *Hoxworth v. Blinder, Robinson & Co.,* 903 F.2d 186, 195 (3d Cir.1990).

Further, in reaching its conclusion that the preliminary injunction dealt "with a matter wholly outside the issues in the suit," *De Beers,* 325 U.S. at 220, 65 S.Ct. at 1134, the *De Beers* Court distinguished the situation where an injunction is granted as to "a fund or property which could have been the subject of the provision of any final decree in the cause." *Id.* at 220, 65 S.Ct. at 1134, *citing*

Deckert v. Independence Shares Corp., 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189 (1940). In *Deckert*, the Supreme Court held that a preliminary injunction was authorized to maintain the status quo where the defendant was shown to be likely to be insolvent at the time of judgment. *Id.* at 290, 61 S.Ct. at 234. The plaintiffs in *Deckert* had also sought final equitable relief, and the Court in part upheld the injunction as a proper exercise of authority under section 22(a) of the Securities Act allowing a court to "enforce" liability, which "implies the power to make effective the right of recovery afforded by the Act." *Id.* at 288, 61 S.Ct. at 233. However, the Supreme Court's decision was not solely based on the fact that equitable or statutory relief had been sought: the Court's generally held that "the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill," and concluded that the *legal* remedy against the defendant would be inadequate due to the allegations that the defendant was insolvent and the danger of dissipation of assets. *Id.* at 290, 61 S.Ct. at 234.[14] *De Beers*'s citation to *Deckert* gives good reason to construe the dicta narrowly.

Moreover, in *United States v. First National City Bank*, 379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965), the Supreme Court upheld a preliminary injunction freezing assets in a suit seeking payment of back taxes. Although there was statutory authority to grant injunctions "necessary or appropriate for the enforcement of the internal revenue laws," *id.* at 380, 85 S.Ct. at 529 (quoting 26 U.S.C. § 7402(a)), the reasoning of the Court was much broader:

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[14] "[I]n light of the Court's generic use of the word 'legal' . . . . the Court justified the injunction as reasonably necessary to preserve the status quo, and thus to ensure the satisfiability of a potential future judgment ordering the transfer of money from defendant to plaintiffs—whether it be deemed legal or equitable in nature." *Hoxworth*, 903 F.2d at 196.

> Once personal jurisdiction of a party is obtained, the District Court has authority to order it to "freeze" property under its control, whether the property be within or without the United States. . . .
>
> . . . .
>
> The temporary injunction issued by the District Court seems to us to be eminently appropriate to prevent further dissipation of assets. . . . Unlike *De Beers* [citation omitted], there is here property which would be "the subject of the provision of any final decree in the cause." *Id.*, [325 U.S. at] 220 [65 S.Ct. at 1134]. We conclude that this temporary injunction is "a reasonable measure to preserve the status quo" (*Deckert* [citation omitted]).

First National City Bank, 379 U.S. at 384-85, 85 S.Ct. at 532. The preliminary injunction freezing assets was thus upheld in order to protect an eventual money judgment.

Most of the circuits have held that a preliminary injunction is available in these circumstances. In *Hoxworth,* 903 F.2d 186, the Third Circuit held that a preliminary injunction was authorized in "extraordinary circumstances" in a suit seeking only money damages, such as where there is a possibility that the defendant would be insolvent at the time of judgment. As in this case, the defendants in *Hoxworth* had argued "that a district court lacks the *power* to protect a potential future damages remedy by a preliminary injunction encumbering assets, even assuming that the usual criteria for obtaining a preliminary injunction are met." *Id.* at 189. The Third Circuit rejected that argument.

The First Circuit has also upheld a preliminary injunction entered in a lawsuit seeking money damages. In *Teradyne Inc. v. Mostek Corp.,* 797 F.2d 43 (1st Cir. 1986), the court held that in a breach of contract action, it was within the district court's authority to enjoin the

defendant from disposing of assets where there was danger that the defendant would be insolvent prior to judgment. *Id.* at 52-53. The court explicitly rejected the defendant's argument htat injunctive relief could not be granted where only monetary relief was sought. *Id.* at 52. In support of its conclusion, the *Teradyne* court also cited *Deckert.*

In *Roland Machinery Co. v. Dresser Industries,* 749 F.2d 380 (7th Cir.1984), the court explained that a preliminary injunction would be appropriate in certain circumstances:

> Where the only remedy sought at trial is damages, the two requirements—irreparable harm, and no adequate remedy at law—merge. The question is then whether the plaintiff will be made whole if he prevails on the merits and is awarded damages. . . .
>
> . . . . A damages remedy can be inadequate for any of four reasons:
>
> (a) The damage award may come too late to save the plaintiff's business. . . .
>
> (b) The plaintiff may not be able to finance his lawsuit against the defendant without the revenues from his business that the defendant is threatening to destroy. . . .
>
> (c) Damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected. . . .
>
> (d) The nature of the plaintiff's loss may make damages very difficult to calculate.

Id. at 386. The Seventh Circuit thus applied the traditional equitable test for the issuance of a preliminary injunction.

The Second, Fourth, Eighth, Tenth, and District of Columbia Circuits agree. *See Green v. Drexler (In re:*

Feit & Drexler, Inc.), 760 F.2d 406, 416 (2d Cir.1985) ("[E]ven where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant intended to frustrate any judgment on the merits by transferring its assets out of the jurisdiction. . . . this is an appropriate case for the issuance of injunctive relief to prevent [the defendant] from making uncollectible any judgment.") (internal quotations and citations omitted); *United States ex rel. Taxpayers Against Fraud v. Singer Co.,* 889 F.2d 1327 (4th Cir.1989) (preliminary injunction preventing dissipation of assets permitted where plaintiffs allege that defendant is insolvent and where its assets are in danger of dissipation and depletion; defendant's argument that attachment proceedings under Fed.R.Civ.P. 64 were instead appropriate construed "too narrowly the Supreme Court's approval of the exercise of general equitable power to protect a plaintiff's right to recovery"), *citing Deckert,* 311 U.S. at 285, 61 S.Ct. at 231-32; *Airlines Reporting Corp. v. Barry,* 825 F.2d 1220, 1227 (8th Cir.1987) (holding in civil RICO, fraud, and conversion case that, "[t]he authority of a trial court to issue a preliminary injunction to ensure the preservation of an adequate remedy is well established"; plaintiff demonstrated that the defendants would not satisfy award of damages and is "entitled to a preliminary injunction to protect its remedy"), *citing Deckert,* 311 U.S. at 290, 61 S.Ct. at 234, *Teradyne,* 797 F.2d at 52, and *Roland,* 749 F.2d at 386; *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.,* 805 F.2d 351, 355 (10th Cir.1986) (preliminary injunction warranted where irreparable harm would result from inability to collect money judgment); *Foltz v. U.S. New & World Report,* 760 F.2d 1300, 1309 (D.C. Cir.1985) (upholding authority of district court in ERISA action to enjoin pay-out of all assets because "an equitable remedy designed to freeze the *status quo* . . . would be entirely in keeping with the principles that undergird equity jurisprudence").

The Fifth and Eleventh Circuits have held to the contrary. In *Dixie Carriers, Inc. v. Channel Fueling Service, Inc. (In re: Fredeman Litigation)*, 843 F.2d 821 (5th Cir.1988), the court held "the general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment." *Id.* at 824. Reviewing the *De Beers* decision, the court concluded that a claim for money damages is not "related to" the underlying litigation because the plaintiffs did not seek the return of a *particular* asset or fund that had been used to violate a statute. *Id.* at 825.[15] *See also Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507 (11th Cir.1994) (recharacterizing preliminary injunction freezing assets to preserve judgment as writ of attachment, for which state law did not provide authority).

We join the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment. This holding is thus restricted to only *extraordinary* cases in which equitable relief is not sought. Our conclusion thus avoids the concern in *De Beers* of

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[15] However, the Fifth Circuit's rulings on this point are somewhat inconsistent. *See Federal Savings & Loan Corp. v. Dixon*, 835 F.2d 554, 560 n. 1 (5th Cir.1987) ("We are unwilling to say that *no* circumstances could support an injunction to secure a legal remedy . . . . difficulty in collecting a damage judgment may support a claim of irreparable injury."), *citing Tri-State Generation*, 805 F.2d at 355. *See also Productos Carnic v. Central American Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir.1980) ("even were [the] remedy limited to damages, an injunction may issue to protect that remedy"). The *Fredeman* court labelled this statement in *Productos Carnic* dicta in view of the equitable nature of that case. 843 F.2d at 827.

the "sweeping effect" that a plaintiff in any action requesting damages can apply for an injunction to sequester his or her opponent's assets. 325 U.S. at 222-23, 65 S.Ct. at 1135.

In its findings supporting the preliminary injunction, the district court found a substantial likelihood that plaintiffs would succeed on the merits. In fact, the plaintiffs have since prevailed at trial on liability and have been awarded substantial exemplary damages. The court further found that plaintiffs would be irreparably injured and that the remedies at law were not adequate if the injunction were denied, concluding that there was substantial danger that the defendants would tranesfer or conceal its funds, resulting in denying recovery to the plaintiffs. In support of this conclusion, the district court found (1) that an ultimate judgment would likely exceed $320 million, (2) that the Estate has about $320 million in assets in banks in Switzerland and Hong Kong, (3) that the *Trajano* plaintiffs have been unable to execute upon Imee Marcos-Manotoc's assets to collect the $4.4 million judgment, (4) that federal courts have twice enjoined the Marcoses from transferring or secreting assets, based on a pattern and practice of secreting assets through foreign bank accounts by the use of aliases and shell corporations, *see Republic of the Philippines v. Marcos,* 862 F.2d 1355 (9th Cir.1988), and *Republic of the Philippines v. Marcos,* 806 F.2d 344 (2d Cir.1986), *cert. dismissed,* 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784; *cert. denied,* 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987), and (5) that no probate proceedings had been opened for Ferdinand Marcos. The court further found that the Estate would not be harmed by the injunction because the Estate cannot distribute its assets until claims against it are resolved, the assets of the Estate may continue to be invested, and that the balance of hardships tips sharply in favor of issuance of the injunction. The Estate does not challenge these findings.

The district court did not abuse its discretion in preliminarily enjoining the Estate from transferring, secreting or dissipating the State's assets *pendente lite*. The district court applied correct law, and its factual findings (not challenged by the Estate) support the conclusion that money damages would be an inadequate remedy due to evidence that the Estate has engaged in a pattern of secreting or dissipating assets to avoid judgment.

AFFIRMED.

APPENDIX B

[Filed Jul. 29, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-15526
D.C. No. MDL 840

IN RE: ESTATE OF FERDINAND MARCOS,
HUMAN RIGHTS LITIGATION

MAXIMO HILAO, *et al.*,
Class Plaintiffs;

VICENTE CLEMENTE, *et al.*;
Class Plaintiffs;

JAIME PIOPONGCO, *et al.*,
Class Plaintiffs
Plaintiffs-Appellees,

v.

ESTATE OF FERDINAND MARCOS,
Defendant-Appellant.

ORDER

BEFORE: GOODWIN, TANG, and NOONAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

[Filed Nov. 16, 1992]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MDL No. 840

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

ORDER GRANTING PLAINTIFFS' MOTION TO MODIFY THE PRELIMINARY ORDER AND FOR OTHER RELIEF

The Court having considered Plaintiffs' Motion To Modify the Preliminary Order and For Other Relief, memoranda, affidavits and exhibits on file with the Court, and having heard the argument of counsel,

AND NOW THEREFORE, upon consideration of Plaintiffs' Motion To Modify the Preliminary Order and For Other Relief, the Court makes the following findings:

1. On November 20, 1991 this Court entered a Preliminary Injunction enjoining the legal representatives of the Estate, including their agents and representatives, from transferring, dissipating or secreting the assets of the Estate, specifically finding that plaintiffs had demonstrated a substantial likelihood of success on the merits. (*See* Exhibit "A" attached hereto.),

2. On September 24, 1992 a jury returned verdicts on liability for the plaintiff class and specific plaintiffs.

3. On September 28, 1992 Imelda Marcos, a legal representative of the Estate, filed a Complaint in the Philippines against the plaintiff victims seeking to enjoin them from pursuing their damage claims in this Court. (*See* Exhibit "B" attached hereto.)

4. To date, the defendant Estate has never initiated a probate proceeding anywhere in the world.

5. At the time Imelda Marcos answered Interrogatory 4 (*see* Exhibit "C" attached hereto) in February 1991, she claimed lack of information about the Estate's assets because of her inability to investigate. She should be compelled to supplement her answer in detail since she has had ample opportunity to identify all assets both personally and through her attorneys.

6. It appears from the expert narrative of Caesar Parlade and other sources (*see* Exhibit "D" attached hereto) that the following banks have assets belonging to the defendant Estate:

a. Swiss Bank Corporation

b. Bank Paribas (Suisse) S.A.

c. Bank Hofmann A.G. Zurich

d. Credit Suisse

7. The foregoing banks should be specifically named as agents or representatives of the defendant Estate.

8. In the past several months Imelda Marcos, through her attorney, James Linn, has paid over $400,000 of obligations of the Estate in Hawaii.

9. To insure that defendant is abiding by the terms of the Preliminary Injunction and to enable plaintiffs to obtain evidence on the issue of exemplary damages, plaintiffs request leave:

a. to obtain relevant documents and take the deposition of Imelda Marcos and the children of Ferdinand E. Marcos on the subject of the Estate's assets; and

b. to obtain relevant documents and take the depositions of representatives of the above listed banks regarding the nature, amount and investment of the Estate's assets.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Order Granting Plaintiffs' Motion For Preliminary Injunction entered November 20, 1991 is hereby modified:

a. to set forth the jury verdict on liability;

b. to compel the legal representatives of the Estate to fully and completely answer plaintiffs' interrogatory number 4;

c. to name Swiss Bank Corporation, Bank Paribas (Suisse) S.A., Bank Hofmann A.G. Suisse and Credit Suisse as agents or representatives of the defendant Estate; and

d. to permit plaintiffs to conduct discovery (including depositions) of Imelda Marcos, the children of Ferdinand E. Marcos, and the above-mentioned banks.

DATED: Nov. 16, 1992

/s/ Manuel L. Real
MANUEL L. REAL
MDL 840 Transferee Judge

APPENDIX D

[Filed Nov. 20, 1991]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MDL No. 840

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

ORDER GRANTING PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

Plaintiffs' Motion For Preliminary Injunction was heard before the Honorable MANUEL REAL of the above-entitled Court on November 15, 1991 at 3:00 P.M., Pacific Time, by telephone conference. ROBERT A. SWIFT and SHERRY P. BRODER appeared on behalf of the *Hilao* Plaintiffs; RANDALL SCARLETT appeared on behalf of the *Clemente* and *Ortigas* Plaintiffs; ELLEN LUTZ and PAUL HOFFMAN appeared on behalf of the *Sison* and *Piopongco* Plaintiffs; and CONNOR HELMS appeared on behalf of the Defendant Estate of Ferdinand E. Marcos.

Neither party having requested to call live witnesses and the Court having reviewed the pleadings, memoranda, declarations and affidavits on file with the Court, and having heard the oral arguments of counsel.

AND NOW, the 15th day of November, 1991, upon consideration of Plaintiff's Motion for Preliminary Injunction and Defendant's response thereto, the Court

makes its findings of fact and conclusions of law in accordance with F.R.C.P. 52(a) as follows:

1. There is a substantial likelihood that plaintiffs will succeed on the merits. See Transcript of Hearing October 7, 1991 denying summary judgment.

2. An ultimate judgment on the merits is likely to exceed $320 million. See Order entered April 15, 1991 granting class certification.

3. On May 14, 1991 this Court entered judgment in the amount of $4.4 million in *Trajano v. Imee Marcos-Manotoc* No. 86-207 (D. Haw.), involving the torture and death of a single victim. To date plaintiffs have been unable to locate and execute upon Imee Marcos-Manotoc's assets, and Imelda Marcos and Ferdinand R. Marcos were evasive in their deposition testimony as to Imee Marcos Manotoc's whereabouts and assets.

4. The Estate of Ferdinand Marcos has about $320 million in assets on deposit in bank accounts in Switzerland and Hong Kong. See answer of Imelda Marcos to Interr. 4. Mrs. Marcos did not identify any assets of the Estate other than these bank accounts.

5. Federal courts in California and New York have twice enjoined the transfer of the Marcoses assets finding a pattern and practice of secreting their assets through foreign bank accounts in alias names and the use of shell corporations, and the courts of appeals have twice affirmed the injunctions. See *Republic of the Philippines v. Marcos* 862 F.2d 1355 (9th Cir. 1988); *Republic of the Philippines v. Marcos,* 806 F.2d 344 (2nd Cir. 1986).

6. The worldwide injunction against transfer of the Marcos assets issued by the federal district court in *Republic of the Philippines v. Marcos,* No. 86-3859 (MRP) (C.D. Cal.), was dissolved by dismissal of that case on November 4, 1991.

7. No probate proceeding has been opened for Ferdinand Marcos in this country or elsewhere even though he died over two years ago leaving a Will naming his wife and son as his personal representatives. See Transcript of Hearing, November 6, 1991 and Will of Ferdinand Marcos.

8. It is probable that the Estate has assets other than the identified foreign bank accounts.

9. The Marcoses had a very highly developed and sophisticated pattern and practice of concealing and secreting their assets by various methods.

10. There is a substantial danger that, if this Order were not issued, the Defendant and its representatives against whom this Order is directed would transfer or conceal funds, property and books and records, placing said items beyond the Court's process and recovery by Plaintiffs in this action.

11. Plaintiffs therefore would be irreparably injured if an injunction were not issued.

12. Plaintiffs' remedies at law are not adequate to prevent such irreparable harm.

13. Trial of liability will commence on February 18, 1992. See Transcript of Hearing, July 8, 1991.

14. The requested injunction seeks to preserve the status quo.

15. The defendant Estate cannot distribute its assets to benefiiciaries until claims against it are resolved.

16. The assets of the defendant Estate may continue to be invested prudently during the pendency of this litigation.

17. The defendant State will not be harmed by entry of the requested injunction.

18. An injunction is necessary to preserve the status quo.

19. The balance of hardships resulting from the issuance or non-issuance of injunctive relief tips sharply in favor of issuance of injunctive relief.

20. Plaintiffs are largely impecunious.

21. The Defendants Estate will not be damaged by entry of an injunction.

22. No security bond is necessary.

THEREFORE, IT IS HEREBY ORDERED AND DECREED that Defendant and its representatives and agents are, until further Order of this Court, hereby restrained and enjoined from directly or indirectly:

A. transferring, conveying, encumbering, dissipating, converting, concealing, or otherwise disposing of in any manner any funds, assets, claims or other property or assets owned actually, equitably or beneficially by, or in the possession or custody of or held by or in any way on behalf of or for the benefit of the Estate of Ferdinand Marcos; and

B. destroying, mutilating, concealing, transferring, altering or otherwise disposing of in any manner any books, records computer programs, computer files, computer printouts, correspondence, memoranda, brochures, or any other documents of any kind, or pertaining in any manner to Ferdinand Marcos, the Estate of Ferdinand Marcos or its representatives, except to their attorneys or in compliance with lawful judicial orders issued by a Court of competent jurisdiction of the United States.

IT IS FURTHER ORDERED AND DECREED that this Order may be served on legal counsel for representatives of the defendant Estate, it appearing that said representatives are currently outside the United States, as follows:

A. On Imelda Marcos as legal representative of of the estate of Ferdinand E. Marcos by service on her attorney Lex Smith by hand delivery or facsimile; and

B. On Ferdinand R. Marcos as legal representative of the Estate of Ferdinand E. Marcos by service on his attorney John Barkto by certified mail or facsimile.

IT IS FURTHER ORDERED AND DECREED, upon Stipulation by the parties that nothing herein shall prohibit consummation of the Settlement Agreement and Partial Release of Claims in the *Republic of the Philippines v. Marcos,* No. 86-3859 (MRP) (C.D. Cal.)

DATED: 11/19, 1991

/s/ Manuel Real
MANUEL REAL
MDL Transferee Judge

Supreme Court, U.S.
FILED
DEC 28 1994
OFFICE OF THE CLERK

No. 94-775

In the Supreme Court of the United States

OCTOBER TERM, 1994

ESTATE OF FERDINAND E. MARCOS,
Petitioner,

v.

MAXIMO HILAO, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant review to determine whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1602-11, is relevant to a suit challenging actions taken by an official of a foreign government outside the scope of official responsibilities, when all the lower courts that have considered this question have concluded that it is not?

2. Should this Court grant review to determine the extraterritorial reach of the Alien Tort Claims Act, 28 U.S.C. § 1350, when this issue has become largely moot because of the passage of the Torture Victim Protection Act of 1991, P.L. 102-256, 106 Stat. 73 (1992), which clearly has extraterritorial application?

3. Should this Court address the power of a federal court to issue an in personam preliminary judgment preventing the transfer or dissipation of a defendant's assets pendente lite to protect a damage remedy when the courts have reserved this remedy for extraordinary cases?

4. Whether this case is an appropriate one to review when the preliminary injunction is likely to be vacated in favor of a permanent injunction in January 1995 and there is now pending in the Ninth Circuit another appeal from a modification to the preliminary injunction?

LIST OF PARTIES

This multi-district case consists of a class action for 10,059 individuals and several direct action cases for 23 individuals. The names of the representative plaintiffs and the direct action plaintiffs are as follows:

Celsa Hilao, Danilo de la Fuente, Renato Pineda, Adora De Vera, Domiciano Amparo, Rodolfo Benosa, Jose Duncan, Josefina Forcadilla, Arturo Revilla, Fluellen Ortigas, Ramon Veluz, Alfonso King, George Gaddi, Ramon Mappala, Emmanuel Umali, Ester Albano-Garcia, Jerrold Garcia, Crispin Aranda, Marcelino de Leon, Ramon Castaneda, Geraldo Socco, Manuel Buncio, Vicente Clemente, Jose E. Asuncion, Apolinario Madayag, Sr., Susan Araneta, Rex T. Brown, Don Facic, Eugenia Torres, Ramon Jalipa, Jose Maria Sison, Jaime S. Piopongco, Florentina Sison, Ramon Sison and Amalia Sison.

A list of the 10,059 class members is on file with the district court. The defendant is the Estate of Ferdinand E. Marcos, which is represented by Imelda Marcos and Ferdinand R. Marcos, Jr.

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No. 94-775

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ESTATE OF FERDINAND E. MARCOS,
Petitioner,

v.

MAXIMO HILAO, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This multi-district case includes a class action and several direct action cases brought by the victims of torture, extrajudicial murder, and forced disappearance against the Estate of Ferdinand Marcos. At least 10,059 individuals submitted claim forms providing detailed and specific information regarding their torture or the summary execution or disappearance of their loved ones. A jury in the U.S. District Court for the District of Hawaii found in September 1992 that Ferdinand Marcos was directly responsible for the harm suffered by plaintiffs and the class members, and also determined in February 1994 that $1.2 billion in exemplary damages should be awarded to the victims. The jury will reconvene once again on January 9, 1995 to determine the compensatory damages owed to the plaintiffs and class members. This case is the largest human rights case yet adjudicated in a United States federal court.

Issues related to those presented by Petitioner were included in a Petition for Certiorari filed in the related case of Marcos-Manotoc v. Trajano, No. 92-1559, cert. denied, 113 S.Ct. 2960 (1993).[1] There is presently pending before the Ninth Circuit an appeal from a modification to the preliminary injunction that is the subject of the Petition for Certiorari before this Court. Hilao v. Estate of Ferdinand Marcos, No. 94-16739 (filed Sept. 23, 1994)

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[1]Four other Petitions or Applications have been filed by a member of the Marcos family to this Court during the past seven years. Araneta et ux. v. United States, 479 U.S. 924 (1988); Ferdinand Marcos et ux. v. United States, 484 U.S. 890 (1987); Ferdinand and Imelda Marcos v. United States, 488 U.S. 952 (1988); Ferdinand and Imelda Marcos v. Republic of the Philippines, 490 U.S. 1035 (1989).

REASONS FOR DENYING THE WRIT

The issues raised by Petitioner are not appropriate for review. The unanimous decision of the U.S. Court of Appeals for the Ninth Circuit is consistent in all its major tenets with the holdings of other federal courts on the issues related to the Foreign Sovereign Immunities Act (FSIA) and the Alien Tort Statute, 28 U.S.C. § 1350.[2] Any lingering questions about the applicability of the Alien Tort Statute have been cleared up by Congress's passage of the Torture Victim Protection Act of 1991, P.L. 102-256, 106 Stat. 73 (1992), which clearly has extraterritorial application. The Ninth Circuit's decision upholding the preliminary injunction is supported by the large majority of the circuits that have considered this question. Furthermore, this issue is likely to become moot when the preliminary injunction is converted into a permanent injunction at the trial scheduled in January 1995. See Sears, Roebuck & Co. v. Carpet Layers Union, 397 U.S. 655 (1970).

I. No federal court that has addressed a case similar to the present one has reached a result inconsistent with any of the holdings of the Ninth Circuit regarding the applicability of the FSIA and the Alien Tort Statute. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir. 1984) (Edwards, J., concurring); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); In re Estate of Ferdinand Marcos--Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S.Ct. 2960 (1993); Von

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[2]The Ninth Circuit has also reviewed issues from this case on several earlier occasions: Trajano v. Marcos, 878 F.2d 1438 (9th Cir. 1989) (unpublished); Hilao v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (unpublished); In re Estate of Ferdinand Marcos--Trajano v. Marcos-Manotoc, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S.Ct. 2960 (1993). The Ninth Circuit denied a requested writ of mandamus on September 26, 1991.

Dardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246 (D.D.C. 1985), reversed on other grounds, 736 F.Supp. 1 (D.D.C. 1990); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) and 694 F. Supp. 707 (N.D.Cal 1988); and Abebe-Jiri v. Negewo, No. 90-2010 (N.D.Ga. Aug. 20, 1993) (awarding $500,000 in compensatory and punitive damages to each of three plaintiffs under 28 U.S.C. § 1350 for torture, cruel, inhuman and degrading treatment, and prolonged arbitrary detention committed by defendant while in Ethiopia). See also Linder v. Calero Portocarrero, 963 F.2d 332 (11th Cir. 1992) (recognizing a federal cause of action under diversity jurisdiction for acts of torture and summary execution). Moreover, the overwhelming majority of commentators on the subject have supported the result reached in these decisions.[3]

II. Petitioner's claim that the Ninth Circuit's decision is inconsistent with this Court's holding in Argentine Republic v. Amerada-Hess Shipping Corporation, 488 U.S. 428 (1989), is incorrect. Amerada-Hess involved a suit brought against a foreign government. This case is brought against an individual for actions taken in his individual capacity outside any possible scope of official activity.

Until this Petition for a Writ of Certiorari, Petitioner has never argued that the brutality orchestrated by Ferdinand Marcos was undertaken as part of his official duties. Indeed, Petitioner has consistently denied that Marcos even committed these acts.

Although the Ninth Circuit has ruled that the Foreign Sovereign Immunities Act (FSIA) does protect officers of foreign

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[3]See articles cited in David Cole, Jules Lobel & Harold Hogju Koh, Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos. 20 Hastings Int'l & Comp. L. Rev. 1, 23 n.78 (1988).

states in certain situations, Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990), the Ninth Circuit has also consistently ruled that the FSIA:

> does not immunize a foreign official engaged in acts beyond the scope of his authority:
>
> > Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do.

In re Estate of Ferdinand Marcos, 25 F.3d 1467, 1470 (9th Cir. 1994)(quoting from Chuidian, supra, 912 F.2d at 1106). Petitioner has cited no cases that reach a contrary result.

If any doubt remained on this issue, it was certainly cleared up by the passage of the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992), which expressly creates a cause of action against an individual who tortures or murders another person "under actual or apparent authority, or color of law, of any foreign nation" (Section 2(a)). In the event of any inconsistency between the TVPA and the FSIA, the TVPA would prevail as the later in time.[4]

III. Petitioner's claim that the Alien Tort Statute, 28 U.S.C. § 1350, should not be interpreted to have an extraterritorial effect is contrary to all decisions that have interpreted this statute.

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[4]See also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) (Rehnquist, C.J.):

> The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

Petitioner cites Smith v. United States, 113 S.Ct. 1178, 1182 (1993), for the proposition that statutes are to interpreted to apply only within the United States unless a contrary intent appears. The Alien Tort Statute, however, clearly evinces such a contrary intent through its explicit reference to "an Alien," "the law of nations,' and "a treaty of the United States."[5] And courts, government officials, and commentators have understood it to apply extraterritorially since the early days of our nation's history. See, e.g. 1 Op. Atty' Gen. 57, 58 (1795) (the U.S. Attorney General stated that U.S. courts had jurisdiction under the Alien Tort Statute over a claim against an American slave trader who provoked an international incident by plundering the British colony of Sierra Leone in Africa: "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States"); Filartiga, supra (torture in Paraguay); Forti v. Suarez-Mason, supra (torture in Argentina); Abebe-Jiri, supra (torture in Ethiopia).

Even if Petitioner's proposed interpretation were somehow correct, it would be rendered moot by the passage of the TVPA, which evinces an unequivocal understanding that it is to be applied extraterritorially. Congress, in passing the TVPA, and President Bush in signing it, explicitly reaffirmed that the federal courts of the United States should be open to the claims of victims of torture and murder who have suffered at the hands of foreign government

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[5]See United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980) (extraterritorial application of statute may be inferred from nature of conduct proscribed). Certainly the first Congress intended the Alien Tort Statute to provide a cause of action against pirates operating outside the U.S. territorial sea who plundered foreign shipping, and this Court interpreted the criminal statute on piracy to apply to acts of piracy by one alien against another. United States v. Pirates, 18 U.S. (5 Wheat.) 184, 204-05 (1820); United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

officials, if they can obtain personal jurisdiction over these officials. The language of the TVPA and the legislative history supporting this statute leave no doubt that it was designed to clear up any doubt regarding the holdings of Filartiga, supra, (1) that torture committed "under actual or apparent authority, or color of law, of any foreign nation" is prohibited by the law of nations (see Section 2(a) of the TVPA), and (b) that the Alien Tort Statute provides both subject matter jurisdiction and a cause of action for a claim brought by one alien against another alien, even if the act occurs outside the United States. See The Torture Victim Protection Act of 1991: Report No. 102-249 of the Senate Judiciary Committee, 102d Cong., 1st Sess., at 3 (Nov. 26, 1991), Torture Victim Protection Act of 1991: Report No. 102-367 of the House Judiciary Committee, 102d Cong., 1st Sess., at 3-4 (Nov. 25, 1991); Torture Victim Protection Act of 19898: Report No. 101-55 of the House Judiciary Committee, 101st Cong., 1st Sess., at 2-3 (1969).[6]

IV. Requests to enjoin the use of a defendant's assets to preserve a damage remedy are rarely made. As a result, the availability of such relief has been reserved for extraordinary cases. The seeming difference among the circuits on this point, therefore, is more rhetorical than substantive in application, and does not warrant review by this Court.

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[6]In explaining why the TVPA was needed when the Alien Tort Statute was already in place, the Congressional reports state that the TVPA builds on the Alien Tort Statute "in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." Senate Rpt. No. 102-249, supra, at 5; House Rpt. No. 102-367, supra, at 4. It is hard to imagine a more explicit recognition that both the Alien Tort Statute and the TVPA were intended by Congress to apply "abroad," i.e., outside the territory of the United States.

As found by the Ninth Circuit, the instant case is certainly extraordinary. Id. 25 F.3d at 1480 The defendant is an unprobated Estate with assets of at least several hundred million dollars. The number of claimants alleging torture, summary execution or disappearance is in excess of 10,059. The verdict on damages was expected to, and did, exceed the Estate's known assets. The decedent, Ferdinand Marcos, and his spouse Imelda Marcos engaged in a variety of deceptive schemes in international finance over a 20 year period to secret their funds including un-numbered Swiss bank accounts controlled by Liechtenstein foundations. Two circuit courts in unrelated litigation upheld findings of their scheming and deceptive practices. Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988)(en banc). Moreover, the scheming to avoid payment of an ultimate judgment did not end with entry of the preliminary injunction. The District Court recently found that after issuance of the preliminary injunction the defendant Estate, through its legal representative Imelda Marcos, entered into two agreements to transfer and split the Estate's assets. (Tr. 9/12/94 at 59) Mrs. Marcos' refusal to consent to release of the Estate's Swiss bank records resulted in the entry of sanctions against the Estate. (Order, 9/3/93)

Petitioner's "scorecard" on the split of authority among the circuits at page 11 of its Petition is dramatically misleading. Petitioner asserts that four circuits (the First, Third, Fourth, and Ninth) allow injunctions pendente lite to freeze assets even if no equitable remedies are sought and four others (the Fifth, Sixth, Tenth, and Eleventh) do not. Upon closer inspection, however, it appears that all the circuits allow preliminary injunctions to prevent the dissipation of assets in extraordinary cases except the Fifth and Eleventh Circuits, and even the Fifth allows them in some situations. Petitioner ignores the decisions of the Seventh Circuit (Roland Machinery Co. v. Dresser Industries, 749 F.2d 380 (7th Cir. 1984)), the Eighth Circuit (Airlines Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987)), and the District of Columbia

Circuit (Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C. Cir. 1985), all supporting the issuance of a preliminary injunction preventing dissipation of assets in extraordinary circumstances.

Petitioner's claim that the Sixth Circuit forbids such injunction is undercut by an examination of the case cited, USACO Coal Co. v. Carbonin Energy Co., Inc., 689 F.2d 94 (6th Cir. 1982), which holds in fact that the district judge did not abuse his discretion in issuing an injunction freezing defendant's assets. The Sixth Circuit stated that "[t]he power of the district court to preserve a fund or property which may be the subject of a final decree is well established." Id. at 97 (citing De Beers Consolidated Mines v. United States, 325 U.S. 212, 220 (1945), and Deckert v. Independence Shares Corp. 311 U.S. 282 (1940)). Similarly, the decision Petitioner cites from the Tenth Circuit, Home-Stake Production Co. v. Talon Petroleum, C.A., 907 F.2d 1012 (10th Cir. 1990), does not support Petitioner's position. That decision dismissed the claim because of a lack of personal jurisdiction, but went on to state that the trustee could seek an attachment with regard to the matter in dispute if he believes "that their assets are in danger of dissipation." Id. at 1021.

Finally, the rulings of the Fifth and Eleventh Circuits seemingly to the contrary came in civil RICO cases presenting no extraordinary facts. In Dixie Carriers, Inc. v. Channel Fueling Service, Inc. (In re Fredeman Litigation), 843 F.2d 821 (5th Cir. 1988) the Fifth Circuit disapproved of a preliminary injunction effectively placing an on-going business in receivership solely to protect a treble damage remedy in a commercial dispute. Unless read narrowly, Dixie Carriers is inconsistent with other decisions of the Fifth Circuit supporting the issuance of a preliminary injunction to protect a damage remedy in extraordinary circumstances. See Federal Savings & Loan Corp. v. Dixon, 835 F.2d 554, 560 n.1 (5th Cir. 1987), and Productos Carnic v. Central American Beef and Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980). The Eleventh Circuit's ruling in Mitsubishi

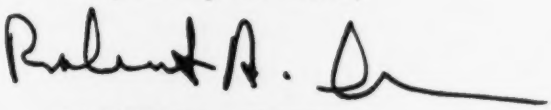
International v. Cardinal Textile Sales, 14 F.3d 1507, 1522 (11th Cir. 1994) simply follows Dixie Carriers in rejecting the use of a preliminary injunction to protect a treble damage remedy in a civil RICO case. In Mitsubishi plaintiffs case was a common commercial dispute cast as a RICO conspiracy, and the injunction placed several on-going businesses into receivership. Unlike the other Circuits, the panels in the Fifth and Eleventh Circuits read DeBeers broadly without analyzing this Court's decisions in Dechert v. Independence Shares Corp., 311 U.S. 282 (1940) and United States v. First National City Bank, 379 U.S. 378 (1965) which upheld preliminary injunctions protecting damage remedies.

The law appears to be clear, therefore, that in extraordinary circumstances a district court may by preliminary injunction prevent the dissipation of a defendant's assets pendente lite to protect a damage remedy.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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